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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re H.S., a Person Coming Under the Juvenile Court Law.	
SOLANO COUNTY DEPARTMENT OF HEALTH & SOCIAL SERVICES, Plaintiff and Respondent, v. Paula S., Defendant and Appellant.	A136411 (Solano County Super. Ct. No. J40513)

This is an appeal by Paula, the mother in a dependency proceeding, from an order following a selection and implementation hearing pursuant to Welfare and Institutions Code section 366.26, that terminated her parental rights and selected adoption as the permanent plan for the child.[1] We conclude that the finding of the adoptability of the child is supported by the evidence, and affirm the judgment.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[2]

H.S. was born approximately four weeks premature in November 2010. At birth, he had respiratory difficulties and was placed on oxygen. The medical records indicate

[1] All further statutory references are to the Welfare and Institutions Code. We will refer to the mother in this appeal by her first name.

[2] Our recitation of the facts up to the point of the dispositional hearing and the order authorizing out-of-county placement of the child will be repeated from our opinions in the two prior appeals in this case (*In re H.S.* (Jan. 5, 2012, A131537) [nonpub. opn.], and *In re H.S.* (Apr. 3, 2012, A132452) [nonpub. opn.]).

that he was a "newborn affected by maternal poly substance abuse during pregnancy," though he showed no signs of withdrawal other than poor feeding. He was placed in protective custody the day after his birth.

On November 30, 2010, the juvenile court ordered H.S. detained. On December 1, 2010, the Solano County Department of Health and Social Services (Department) filed a first amended dependency petition. The petition alleged that Paula has a history of substance abuse, including use of marijuana and methamphetamines, and that her drug use interferes with her ability to provide adequate care, support, and supervision for her son. She allegedly had failed to obtain prenatal care for H.S., had previously given birth to a child who tested positive for methamphetamine exposure, and had admitted to using methamphetamine while she was pregnant with two of her other children. She also admitted to using controlled substances as late as two weeks prior to H.S.'s birth. She reportedly had refused to complete substance abuse treatment programs in the past.

The Department filed its jurisdiction/disposition report on January 18, 2011. The Department alleged that H.S. was at "substantial risk of serious harm or illness" within the meaning of subdivisions (b) and (j) of section 300, and the report recommended that Paula be bypassed for reunification services under section 361.5, subdivision (b)(10), (11), and (13).[3] The report states that Paula was provided voluntary family maintenance services for three older children beginning in November 2008, but that her case was closed in March 2009 due to her refusal to comply with the recommended services. Paula did enter into an outpatient substance abuse treatment program, but attended only nine sessions and tested positive for illicit substances on multiple occasions. After her discharge from that program, she was referred to a different outpatient program, but did not comply with the intake process. Subsequently, a dependency was declared as to all three minors. Jurisdiction was dismissed as to two of the children, who were placed with their fathers.

[3] The report recommend that H.S.'s father, T.S., be provided with family reunification services. T.S. is not a party to this appeal.

As to the third child, M.S., Paula was offered family reunification services but refused to participate. In May 2009, following a contested six-month review hearing, the juvenile court terminated family reunification services. Paula did not attend the hearing. Her parental rights as to M.S. were terminated in September 2010 and the child was placed with a maternal aunt and uncle who were planning to adopt her.

A search of Paula's criminal history revealed prior arrests for petty theft, use and possession of controlled substances, and battery. Additionally, she tested positive for methamphetamine and marijuana when admitted to the hospital for H.S.'s birth, though H.S. tested negative for all drugs. The report further alleged that Paula was unsuccessful in completing previously arranged substance abuse treatment. She refused further referrals, and was resistant to efforts to assist her and her family. The report recommended that reunification services not be provided due to her failure to address her ongoing problems, and states that offering her services would not be in H.S.'s best interest due to his immediate need for stability and Paula's failure to demonstrate her willingness to address the identified areas of concern. The report reflected that Paula told the Department's social worker she believed all prior allegations made against her concerning child abuse and neglect were false and never proven. She denied that her use of substances has interfered with her parenting, though she admitted to drug use during her pregnancies. She stated that over the last several months, she attended 12-step meetings between six to eight times a month and denied the need for formal substance abuse treatment.

On February 14, 2011, a contested jurisdictional/dispositional hearing was held. Based on its review of the Department's report and the testimony of a Department social worker, the juvenile court concluded H.S. came within section 300, subdivisions (b) and (j). He was continued in foster care in a non-relative placement. The court reduced Paula's visitation with H.S. from two to one time each week. The court declined to order reunification services for her.

The first appeal in the case followed (A131537). On appeal, we upheld the juvenile court's jurisdictional/dispositional determinations, as well as its decision to deny Paula reunification services. We also affirmed the court's order limiting her visits with her son to one per week, and found she had waived the issue of whether the Department failed to exercise due diligence in attempting to locate appropriate relatives for H.S.'s placement. (*In re H.S.* (Jan. 5, 2012, A131537) [nonpub. opn.].)

On April 4, 2011, the Department filed a request to change a court order pursuant to section 388. The Department's social worker indicated that the child was becoming increasingly attached to his current foster mother who was not a concurrent foster home. A secondary adoption worker had reportedly identified two prospective concurrent foster homes for the child, both of which were located outside of Solano County. As the juvenile court's dispositional order specified placement of the child in an approved home within the county, a modification was required in order to allow the county to pursue these placement options.

On June 2, 2011, counsel for the Department advised the court that the proposed out-of-county placement was located in Sacramento, and that the prospective foster parents were committed to bringing the child to Solano County for parental visitation. The juvenile court granted the Department's request.

On July 19, 2011, the Department filed a six-month status review report. According to the report, H.S.'s father reported that the mother was asked to leave the residence she shared with the father in San Bruno – the home of the father's sister – due to her ongoing drug abuse, and was living in Missouri with her parents. The father hoped to relocate to Missouri to live with the mother, and have the dependency case transferred there. The mother had not visited with the child since May 16, 2011; thereafter, she either canceled visitation sessions or did not appear for scheduled visitation. On July 14, 2011, the mother filed a notice of change of mailing address in the state of Missouri.

The child continued to reside in a foster home located in Solano County, where he appeared to be content. The report indicated that the child was developmentally retarded,

and medical tests were ordered to determine the cause, nature and extent of his developmental delays. The six-month report recommended that the juvenile court terminate the father's reunification services and set the case for a section 366.26 selection and implementation hearing.

The contested six-month review hearing was held on September 22, 2011. The minutes indicate that the juvenile court attempted to contact Paula via telephone with no success. As pertinent here, the social worker testified that the child is "severely developmentally disabled," either "partially or completely blind," and suffers from a "seizure disorder" which causes "infantile spasms." Recent MRI results revealed that the child suffered from a "partial absence of the hypoplasia corpus callosum" of the brain, which resulted in a deficiency in communication of "different parts of the brain." The social worker indicated that the child was not currently an appropriate candidate for adoption, although a foster home was prepared to provide long-term care for the child.

At the hearing, reunification services to the father were terminated and the matter was set for a section 366.26 hearing. On September 28, 2011, the juvenile court filed its findings and orders after hearing. As part of its orders, the court continued to authorize out-of-county placement of the child.

Apparently, the Department did not exercise the placement discretion granted to it under the June 2, 2011 order, as the child was still with his in-county placement when the Department's six-month status report was filed, and there is no evidence this circumstance changed prior to the September 22, 2011 hearing. In the second appeal we therefore found the mother suffered no prejudice as a result of the first out-of-county placement order, and the September 28, 2011 order effectively superseded the prior order by again authorizing an out-of-county placement. We further perceived no reason to exercise our discretion to decide this matter on the merits, as Paula voluntarily left the state and was unavailable for visitation with her son. Accordingly, with no possibility of granting effective relief, the second appeal was dismissed as moot.

The case proceeded to the section 366.26 hearing. Two section 366.26 reports were filed by the Department: the first on December 29, 2011; the second on June 12, 2012. The first report referred to the results of neurological, ophthalmological and genetic testing of the child in July and August of 2011. He was diagnosed with severe "global developmental delay and hypotonia." In addition to the underdevelopment of the corpus callosum of the brain – that is, the absence of some neural fibers that effectuate communication – he suffers from impairment of the cortical nerve. As a result, he is legally blind; he may see shapes but "will probably never read." His development, if any, will be slow; he may never be able to sit up or walk. He suffered seizures in September of 2011, that were abated with medication. The foster mother with whom the child had been placed expressed that she would provide care for him as long as she was physically able, but had "medical issues" that prevented her from acting as a "permanent placement." The first section 366.26 report considered the child as "generally adoptable due to his age and need for permanency," identified adoption as the permanent plan goal for the "special needs child," and requested an additional six months to continue recruitment efforts to find a suitable adoptive family for him. On January 12, 2012, the court ordered adoption as the permanent placement goal for the child, and granted a continuance to enable the Department to recruit and identify an adoptive family.

The second report noted that the child's medical condition had neither improved nor changed in the past six months. He was receiving physical therapy and services from the Blind Babies Foundation. He was reported to be a "happy" child with "a good temperament." The child continued to reside in the same foster home where he had been placed since December 8, 2010.

The Department identified an adoptive family for the child: an unmarried couple who had been "living together in a committed relationship" for over four years, and planned to marry in the future. They lived in a large, six-bedroom, three-bath house in Solano County, with their own biological children. The prospective adoptive mother, an occupational medical assistant, encountered the child at his medical appointments, and

later expressed an interest in adoption of him to the foster mother. The prospective adoptive father met the child in the couple's home in April of 2012, and joined the mother in wanting to adopt him to "provide him with a permanent family." The social worker observed "positive interactions" between the child and the couple during overnight visits. They both have "experience working with special needs children in the past," and despite the child's disabilities have advised the Department that they have committed to the child "for life." The second report indicated that the prospective adoptive parents have been referred to the Lilliput Children's Services to complete their foster care certification, criminal clearance, and adoption home study.

The section 366.26 hearing was continued again, this time at the mother's request. On June 1, 2012, during a visit to California the mother reported to the social worker that she had "been clean and sober" for the past year. She stated that she would like the dependency case "transferred to Missouri," and the child "returned to her care."

The section 366.26 hearing occurred on August 16, 2012.[4] The case was submitted by the Department on the two reports. Following brief argument and an objection to termination of parental rights by the mother's counsel, the court found by clear and convincing evidence that the child is likely to be adopted. Parental rights were terminated and adoption was ordered. This third appeal in the case followed.

DISCUSSION

The mother's sole argument on appeal is that the finding of adoptability is "not supported by substantial evidence." She points out that only a single couple was identified as prospective adoptive parents, and they had not yet been certified or approved for adoption. Thus, she claims the child was not specifically or generally adoptable, and the order terminating parental rights must be reversed.

Our review of the trial court's decision is quite constrained. " '[W]hen a court has made a custody determination in a dependency proceeding, " 'a reviewing court will not

[4] Despite the mother's prior statement to the social worker that she intended to remain in California to attend the section 366.26 hearing, she did not do so.

disturb that decision unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination.' " ' [Citation.]" (*In re Michael D.* (1996) 51 Cal.App.4th 1074, 1087, quoting *In re Stephanie M.* (1994) 7 Cal.4th 295, 318; see also *In re Tamneisha S.* (1997) 58 Cal.App.4th 798, 806.) "On review of the order of the juvenile court terminating parental rights, the reviewing court must determine whether there is any substantial evidence to support the trial court's findings. [Citation.] It is not our function, of course, to reweigh the evidence or express our independent judgment on the issues before the trial court. [Citation.] Rather, as a reviewing court, we view the record in the light most favorable to the judgment below and ' "decide if the evidence [in support of the judgment] is reasonable, credible and of solid value—such that a reasonable trier of fact could find that termination of parental rights is appropriate based on clear and convincing evidence. [Citation.]" ' [Citations.]" (*In re Jasmon O.* (1994) 8 Cal.4th 398, 423.) As an appellate court, in the presence of substantial evidence, we do not reweigh conflicting evidence and alter a dependency court determination. (*Constance K.* v. *Superior Court* (1998) 61 Cal.App.4th 689, 705.)

At the 366.26 hearing the court must select and implement one of four alternatives for the permanent plan: " 'termination of parental rights and adoption; identification of adoption as the plan but without immediate termination of parental rights; guardianship[,] or long-term foster care.' [Citation.]" (*In re Jessie G.* (1997) 58 Cal.App.4th 1, 5-6.) "Adoption, if possible, is the preferred plan for such children. However, the court is to choose the disposition best for the child." (*In re Tamneisha S., supra,* 58 Cal.App.4th 798, 804.)

"In order for the court to select and implement adoption as the permanent plan, it must find, by clear and convincing evidence, the minor will likely be adopted if parental rights are terminated. (§ 366.26, subd. (c)(1).) The parent then has the burden to show termination would be detrimental to the minor under one of four specified exceptions. (§ 366.26, subd. (c)(1)(A), (D).) In the absence of evidence termination would be detrimental to the minor under one of these exceptions, the court '*shall* terminate parental

rights . . . .' [Citations.]" (*In re Tabatha G.* (1996) 45 Cal.App.4th 1159, 1164; see also *Cynthia D.* v. *Superior Court* (1993) 5 Cal.4th 242, 249; *In re Shaundra L.* (1995) 33 Cal.App.4th 303, 307.)

The record before us establishes that H.S. was adoptable. "In making the determination of adoptability, the juvenile court 'must focus on the child, and whether the child's age, physical condition, and emotional state may make it difficult to find an adoptive family.' [Citation.] 'A child's young age, good physical and emotional health, intellectual growth and ability to develop interpersonal relationships are all attributes indicating adoptability.' [Citation.] 'If the child is considered generally adoptable, we do not examine the suitability of the prospective adoptive home. . . .' [Citation.]" (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1526.) However, where the child is deemed adoptable based solely on the fact that a particular family is willing to adopt him or her, the trial court must determine "whether there is any legal impediment to the prospective adoptive parent's adoption and whether he or she is able to meet the needs of the child." (*In re Helen W.* (2007) 150 Cal.App.4th 71, 80; see also *In re Carl R.* (2005) 128 Cal.App.4th 1051, 1061.) "And '[u]sually, the fact that a prospective adoptive parent has expressed interest in adopting the minor is evidence that the minor's age, physical condition, mental state, and other matters relating to the child are not likely to dissuade individuals from adopting the minor.' [Citation.]" (*In re Jose C.* (2010) 188 Cal.App.4th 147, 158.)

Here, the Department considered H.S. both generally and specifically adoptable, and the juvenile agreed by stating: "Although the child has needs significant and developmental delays, from all of the reports that I've read, and there's no contradictory evidence, that he's adoptable, and because of his personality, people become attached to him quickly, so there are a couple of people who would adopt him, so I'll make those findings." We see no reason to address the issue of the general adoptability of the child, as the willingness and even enthusiasm of the couple to adopt H.S. is apparent in the

record. (See *In re Jose C., supra*, 188 Cal.App.4th 147, 160.) The evidence further demonstrates that they are particularly suited to meeting the needs of the child.

Contrary to the mother's argument, we decline to find that H.S. is not "specifically adoptable because the identified prospective adoptive parents were not approved yet," and "no other people were ever mentioned in the Department's reports as interested in adopting" him. Here, in contrast to *In re Valerie W.* (2008) 162 Cal.App.4th 1, 14–16, relied on by the mother, the child's significant developmental problems were known and well documented in the thorough assessment report, as was the ability of the identified adoptive parents to meet the child's needs.[5] (See *In re Michael G.* (2012) 203 Cal.App.4th 580, 590.) Further, the pending certification and background check of the prospective adoptive parents does not, under the circumstances, constitute a "legal impediment" to adoption, and the mother failed to produce any evidence to contraindicate adoptability. (See *In re Jose C., supra*, 188 Cal.App.4th 147, 159–160; *In re I.W., supra*, 180 Cal.App.4th 1517, 1526–1527.) We conclude that the finding of adoptability is supported by substantial evidence. (*In re A.A. , supra*, 167 Cal.App.4th 1292, 1312–1313.)

Accordingly, the judgment is affirmed.

[5] The mother challenges the adequacy of the assessment report in this appeal, but no one challenged the agency's assessment on any grounds in the trial court. Having failed to object to the assessment's adequacy in the juvenile court, the mother has waived any such objection on appeal. (*In re A.A.* (2008) 167 Cal.App.4th 1292, 1317; *In re Brian P.* (2002) 99 Cal.App.4th 616, 623.) In any event, we find the assessment report adequate.

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Dondero, J.

We concur:

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Margulies, Acting P. J.

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Banke, J.